

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

77-1230

To be argued by
GEORGE J. KELLY, JR.

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1230

UNITED STATES OF AMERICA,

Appellee,

—v.—

VICTOR WAYNE SYMS,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE APPELLEE

RICHARD BLUMENTHAL

*United States Attorney for the
District of Connecticut*

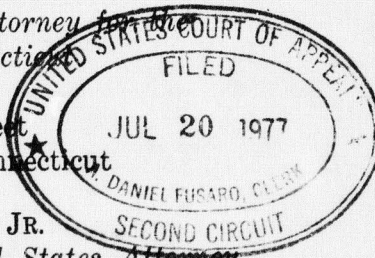
P.O. Box 1824

270 Orange Street

New Haven, Connecticut

GEORGE J. KELLY, JR.

*Assistant United States Attorney
for the District of Connecticut*



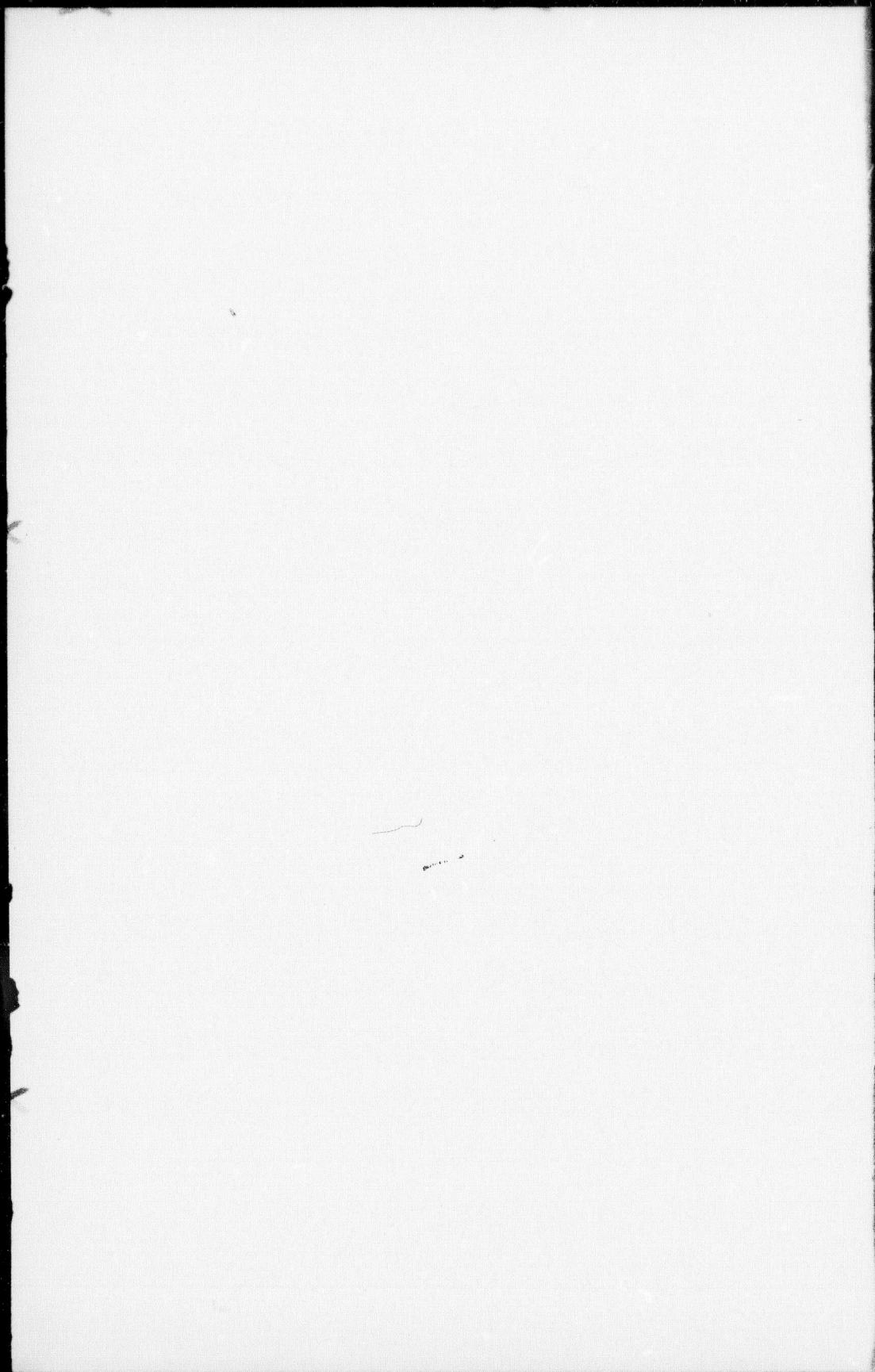


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BRIEF FOR THE APPELLEE

Statement of the Case

On January 13, 1977, a Grand Jury sitting in Hartford, Connecticut, returned a three count indictment (Criminal No. H-77-4) charging the appellant, Victor Wayne Syms, in Count One with bank robbery, in violation of Title 18, United States Code, Sections 2113(a) and 2, and in Count Three with conspiracy, in violation of Title 18, United States Code, Section 371. Frank Leroy Robinson was charged in Counts One and Three with the same offenses, and was also charged in Count Two with possession of money stolen from a bank, in violation of Title 18, United States Code, Section 2113(c). Victor Syms subsequently moved to suppress certain oral and written statements, including a confession, made by him to federal and local law enforcement officers on the date of his arrest.

A hearing on appellant's motion was held on February 14 and 15, 1977, by the Honorable T. Emmet Clarie, Chief United States District Judge. Six witnesses, including the appellant, testified at the hearing. At the close of the hearing Judge Clarie issued an oral ruling denying the motion to suppress. The District Court's written ruling was filed on February 23, 1977.

On March 18, 1977, Victor Syms withdrew his plea of not guilty to Count One of the indictment and entered a plea of guilty to that count. At that time, with the consent of the government and the approval of the District Court, he reserved his right to appeal the denial of his suppression motion.

On April 25, 1977, appellant was sentenced to the custody of the Attorney General for a period of fifteen years, and, on motion of the government, Count Three of the indictment against appellant was dismissed.

Notice of Appeal to this Court was filed on April 26, 1977.

Questions Presented

I. Was the non-forcible entry by the police officers, for the purpose of executing a valid arrest warrant, based on probable cause to believe that Victor Syms was inside the apartment, so that suppression of the confession is not required?

II. Did Donald Sheets, under the totality of the circumstances, effectively consent to the police officers' entry into the apartment?

Statement of the Facts

On December 20, 1976, the Unity Plaza Branch of the Hartford National Bank and Trust Company, a federally insured bank, was robbed of approximately \$3,540.01 by three black males. Weapons, including a sawed-off shotgun, were used in the robbery. (Findings Nos. 1, 18).¹

As a result of the investigation of this robbery by the FBI and Hartford police a warrant for the arrest of Victor Wayne Syms was sought. The warrant was issued by United States Magistrate F. Owen Eagan on December 21, 1976.

Between December 21 and December 24, 1976, officers of the Hartford Police Department investigating the bank robbery went to 132 Hampton Street, Apartment 102, in Hartford at least six times. (Tr. 252) (Finding No. 16) Detective Edgar Campbell had been to the apartment, looking for Victor Syms, at least once during that period (Tr. 46).² Apartment 102 was rented by Muriel Walton, the mother of Cassandra Robinson. Cassandra Robinson was the girlfriend of Victor Syms. (Tr. 104).

On the afternoon of December 25, 1976 Detective Edgar Campbell of the Hartford Police Department was notified by another officer that an unidentified telephone caller had informed the Hartford Police Department that Victor Syms was in an apartment at 134 Hampton Street. In response to this call, Detective Edgar Campbell and several other officers went to that address, knocked on the door of the apartment, but received no response. They then returned to the Police Station (Finding No. 4).

¹ References marked "(Finding No.)" refer to the Findings in the District Court's ruling filed.

² References marked "(Tr.)" refer to the transcript of the suppression hearing on February 14 and 16, 1977.

Shortly thereafter, Detective Campbell himself received a second call, in which the unidentified caller stated that the police had gone to the wrong building, that Victor Syms was at 132 Hampton Street with "his lady", that the caller had just seen them there, and that they were planning to leave soon (Finding No. 5). At that time, Detective Campbell noticed in the case file that 132 Hampton Street was the address of the mother of Victor Sym's girlfriend. (Tr. 6).

Detective Campbell proceeded immediately to 132 Hampton Street, accompanied by three Hartford police officers. (Finding No. 9). Detective Campbell had in his possession three arrest warrants for Victor Syms—the federal bank robbery warrant and two local warrants for unrelated charges (Tr. 9). Upon arrival at the building, Detective Campbell and two of the officers entered, and Detective Campbell knocked on the door of Apartment 102. At that time, Detective Campbell was armed with a snub nosed revolver, which was in his holster; the other two officers, who were standing to the side of Detective Campbell, had their weapons drawn (Finding No. 10).

The door to the apartment was opened by Donald Sheets, who is the boyfriend of Muriel Walton. Detective Campbell identified himself to Sheets and asked him if Victor Syms or Cassandra Robinson were inside. Sheets replied that he did not know whether Victor Syms was there, but that Cassandra Robinson was "in there", pointing to a closed door inside the apartment. (Tr. 9-10, Findings Nos. 11-12). Detective Campbell then entered the apartment, and Mr. Sheets stepped back from the door, allowing him to enter. (Finding No. 12). When he entered the apartment Detective Campbell saw Muriel Walton and asked her where her daughter was. Muriel Walton responded, "She's in there", indicating the same door Donald Sheets had pointed to. When asked whether Victor Syms was there too, Muriel Walton did not respond. (Tr. 10).

Detective Campbell then drew his revolver and knocked on the door they had pointed to. (Finding No. 17). In response to this knock, the door was opened approximately one foot by Cassandra Robinson. Detective Campbell identified himself, stated that he had a warrant for Victor Syms, and asked if he was in the room. (Tr. 14). Miss Robinson said nothing, but turned her head to look behind her. At that point Detective Campbell observed, through the open door, a pair of male legs moving off a bed inside the room. (Finding No. 20).

Detective Campbell then pushed the door open completely, Cassandra Robinson stepped out of the way, and Detective Campbell observed Victor Syms in the room, moving away from the bed. (Tr. 16; Finding No. 20). Detective Campbell placed Victor Syms under arrest, searched him for weapons, handcuffed him and informed him of his *Miranda* rights. (Findings Nos. 21-22).

Detective Campbell drove Victor Syms to the Hartford Police Department headquarters, placed him in an interview room and notified Special Agent Phillip Krumm, by telephone, of the arrest (Findings Nos. 31, 33). Agent Krumm arrived at the police station between 6:00 and 6:30 p.m. (Finding No. 45).

Prior to interviewing Victor Syms, Agent Krumm provided him with a standard warning and waiver of rights form which Syms read and executed at 6:47 p.m. (Government Exhibit No. 2). While reading the form, Syms indicated several times orally to Agent Krumm that he understood his rights. (Finding No. 48). During the interview, Syms stated that he had participated in the bank robbery. Based on Syms's oral statements during the interview, Agent Krumm prepared a five page written statement (Government Exhibit No. 3), which Syms then read, placing his initials on each page and making certain changes in the statement, and signed. (Findings Nos. 54-56).

The following day, Sunday, December 26, Syms, who was in custody at Hartford Police headquarters, told the jail warden that he wished to talk to someone about "this and other cases". (Finding No. 60). In response to this request, Detectives William Kearns and Robert Lajoie spoke to Syms, after Mr. Syms executed a warning and waiver of rights form. (Findings Nos. 61-62). In the course of this interview, Syms stated that neither Muriel Walton nor Cassandra Robinson was involved in the bank robbery. He also identified a photograph of one of the individuals mentioned in his written statement. (Findings Nos. 64-65).

After an appearance in state court on December 26, Victor Syms was taken into federal custody pursuant to the bank robbery warrant.

ARGUMENT

I.

The Non-Forcible Entry By The Police Officers In Order To Execute A Valid Arrest Warrant Was Based On Probable Cause To Believe That Victor Syms Was Inside The Apartment And Therefore Does Not Require That The Confession Be Suppressed.

The District Court correctly concluded that "the execution of the arrest warrant was carried out in a proper and legal manner". (District Court Ruling at 12). Therefore, the motion to suppress statements made later that day to law enforcement officials, after a warning and waiver which fully complied with *Miranda v. Arizona*, 384 U.S. 436 (1966), was properly denied.

The principal issue raised by this appeal involves the standards which must be met by police officers who make

a non-forcible entry into a dwelling in order to execute a concededly valid arrest warrant.³

Two things should be clear at the outset. First, it has long been understood that the situation of an arrest in a dwelling presents one of the exceptions to the search warrant requirement of the Fourth Amendment. *E.g.* *Agnello v. United States*, 269 U.S. 20, 30 (1925); *see*, *Lankford v. Gelston*, 364 F.2d 197, 206 (4th Cir. 1966) (*en banc*). Secondly, the facts of this case do not present the "grave constitutional question" of a "forcible nighttime entry" of a dwelling without an arrest warrant, which was posed in *Jones v. United States*, 357 U.S. 493, 499 (1958), but left open both there and in later cases, *see, e.g. United States v. Watson*, 423 U.S. 432-433

³ The appellant's uncertainty over whether the District Court "ever really considered the question of probable cause" (Brief for Appellant at 7, note) may be resolved by an examination of the record. Early in the hearing Judge Clarie asked counsel for appellant to state the issues raised by his motion. (Tr. 49). After counsel had described the issues of voluntariness and proper *Miranda* warnings with respect to the confession, the following exchange occurred:

Mr. Cramer: . . . There is a third issue which relates to the mode of the arrest. That is, although it is a valid arrest warrant for Victor Syms, and we don't challenge that, but they went into the private home of a third party to effect it.

There are a line of cases—not too many—including a case last week in the Fifth Circuit, *United States versus Cravero*, that holds that even when there is a valid arrest warrant, to go in the home of a third person to effect that arrest, that you need probable cause. We don't think that exists.

The Court: So there is a question of probable cause?

Mr. Cramer: In 132 Hampton Street. If he was on the street, they would have no problem.

(Tr. 50-51). The reason most of the court's findings appear directed toward the first two issues is that most of the evidence by both sides at the suppression hearing was directed toward those issues.

(1976); *United States v. Titus*, 445 F.2d 577, 578 (2d Cir. 1971), *cert. denied*, 404 957 (1971). The entry here was made in the late afternoon,⁴ with an arrest warrant, and without any forcible breaking.

Recent decisions in other circuits have noted that the precise contours of the requirement for entry into a dwelling to execute an arrest warrant have not been determined. *E.g. United States v. Cravero*, 545 F.2d 406, 414 (5th Cir. 1976), *cert. denied*, — U.S. —, 97 S.Ct. 1123 (1977); *Rice v. Wolff*, 513 F.2d 1280, 1292 n.7 (8th Cir.), *rev'd on other grounds sub nom. Stone v. Powell*, 428 U.S. 465 (1976). But the uncertainty has been limited to the question of whether it is sufficient that there was probable cause to believe the suspect was within, *e.g., Cravero, supra*, 545 F.2d at 421; *United States v. McKinney*, 379 F.2d 259, 263 (6th Cir. 1967); or whether there must in addition be exigent circumstances supporting the entry, *Fisher v. Volz*, 496 F.2d 333, 338 (3d Cir. 1974). Appellant appears to concede as much, and, in fact, bases his argument primarily on what he claims to be a lack of probable cause to believe that he was in the apartment at the time of the entry.

Probable cause, whether in the context of a search or an arrest, is, of course, a matter of reasonableness and everyday practicalities. *Brinegar v. United States*, 338 U.S. 160, 175 (1949). And even information received from an unidentified informant is a permissible factor in determining probable cause if sufficiently corroborated

⁴ Fourth Amendment analysis has traditionally recognized that a nighttime entry into a home involves a significantly greater intrusion on the privacy protected by the Amendment than an entry at other times. *E.g., Gooding v. United States*, 416 U.S. 430, 463 (1974) (Marshall, J., dissenting); *Coolidge v. New Hampshire*, 403 U.S. 443, 477 (1971). For one indication of the understanding of the "nighttime" in this context see Rule 41(h), Fed. R. Crim. P. (defining "daytime" as the hours from 6:00 a.m. to 10:00 p.m.)

by other information. See, *United States v. Rollins*, 522 F.2d 160, 164-165 (2d Cir. 1975); *United States v. Cognato*, 408 F. Supp. 1000, 1003, n.5 (D. Conr), *aff'd without opinion*, 539 F.2d 703 (2d Cir. 1976); *United States v. McKinney*, 379 F.2d 259, 264 (6th Cir. 1967). When these principles are applied to the facts of the instant case, it becomes clear that appellant's argument that there was no probable cause must be rejected.

To begin with, contrary to appellant's contention, an anonymous tip was not the "only basis for believing Syms was in the apartment." (Brief for Appellant at 7). When Detective Campbell received the second phone call telling him the officers had gone to the wrong address, the implication immediately arose that the caller was on the scene and had actually observed the officers enter 134 Hampton Street, shortly before the second call was received.⁵ Also by this time, Campbell had reviewed the case file and had noted that Muriel Walton lived at 132 Hampton Street and not 134. (Tr. 6). Campbell not only knew Muriel Walton was the mother of Cassandra Robinson, but he had been to the Walton apartment only a few days before and had been told by Mrs. Walton that her daughter had left town with Victor Syms. (Tr. 61). Thus, appellant's assertion that the police had no information "that Syms even knew Muriel Walton or anyone else who might live there," (Brief for Appellant at 8), is factually incorrect.

Even the cases relied on by appellant provide ample support for a finding of probable cause on these facts. For example, the independent corroboration for the telephone caller's information is significantly more substantial than that used to support the finding of probable

⁵ The two buildings are adjacent to one another (Tr. 6), and it would have been possible for someone in 132 to have seen the officers arrive and approach 134. (Tr. 8).

cause in *United States v. McKinney*, *supra*, 379 F.2d at 264 (month-old information that defendant had in the past been on the premises). And, despite appellant's claim to the contrary, (Brief for Appellant at 8), Sheet's expression of uncertainty over whether Syms was inside the apartment, along with his admission at the same time that Cassandra Robinson was there, certainly lent as much credence to Campbell's belief that Syms was there as any actions by the defendant's girlfriend in *United States v. Brown*, 467 F.2d 419, 423 (D.C. Cir. 1972).

Even if this Court were to require the presence of "exigent circumstances" in addition to probable cause to believe the person named in the arrest warrant is within the dwelling, *see, Fisher v. Volz*, *supra*, 496 F.2d at 338, that test would be met in this case. First, the caller had stated that Syms was going to leave the apartment soon. (Finding No. 5). In addition, having just been in the vicinity of the apartment, the police officers could reasonably assume that Syms might have seen them, thus increasing the likelihood of escape. They already had not just the arrest warrant but positive identification of Syms, by Sheets, in a bank photograph taken during the robbery. (Tr. 101-102). And they were aware that a shotgun used in the robbery had not yet been recovered. The situation thus contained all the factors listed by the Court in *Dorman v. United States*, 435 F.2d 385 (D.C. Cir. 1970) (*en banc*), as justification for a *nighttime* entry in the *absence* of an arrest warrant.⁶

This Court, in fact, has recognized that exigent circumstances, and in particular, the risk of escape, may

⁶ These factors are: a grave offense; reasonable likelihood the suspect is armed; a clear showing of probable cause to believe he committed the offense; strong reason to believe he is on the premises; likelihood of escape; and a peaceable entry. *United States v. Dorman*, 435 F.2d at 392-393.

excuse even the procuring of an arrest warrant even in cases involving forcible entry accompanied by the breaking down of a door. *United States v. Mapp*, 476 F.2d 67, 74 (2d Cir. 1973); see, *Williams v. United States*, 463 F.2d 1183, 1185 (2d Cir. 1972); *United States v. Titus*, *supra*, 445 F.2d at 578. A similar conclusion was reached in *United States v. Cognato*, 408 F. Supp. 1000, 1003 (D. Conn.), *aff'd without opinion*, 539 F.2d 703 (2d Cir. 1976). In the light of these decisions, the appellant's position in the instant case—where there existed an arrest warrant, a permissive, non-forcible entry, strong reason to believe the suspect was inside and reasonable justification for avoiding further delay—is simply not sustainable.

Appellant's repeated references to *Lankford v. Gelston*, 364 F.2d 197 (4th Cir. 1966) (*en banc*) in support of his arguments calls for specific response. *Lankford* was a civil rights action for injunctive relief arising out of what the Court described as "a series of the most flagrant invasions of privacy ever to come under the scrutiny of a federal court." *Id.* at 201. Over a nineteen day period, the police, without search warrants, had conducted, at all hours of the day and night, indiscriminate searches of over three hundred homes, almost invariably on the basis of unverified anonymous tips. *Id.* at 198, 204. Under these circumstances, the plaintiffs sought an injunction requiring the police to obtain a search warrant before executing any arrest warrant in the home of a third person.⁷ The Court declined to issue the injunction as sought.

⁷ Indeed, the passage quoted by appellant at page 6 of his brief is actually a portion of the *Lankford* Court's restatement of the plaintiff's contentions. These contentions, as the Court made clear, were being raised on behalf of the third party victims of the searchers, 364 F.2d at 205; and the Court found no reason to pass on them in reaching its decision. *Id.* at 206.

The point here is not that the impact of a constitutional violation is somehow dependent on the number of similar violations occurring at the same time, *cf.*, *id.* at 201 (suggesting same violations may occur on smaller scale). But to suggest, as appellant does, that the facts of the instant case "parallel" those in *Lankford*, is simply to ignore the facts in the two cases. It suffices to observe that the decree actually issued by the Lankford Court enjoined:

the Police Department from conducting a search of any private house to effect the arrest of any person not known to reside therein, whether with or without an arrest warrant, where the belief that the person is on the premises is based only on an anonymous tip and hence without probable cause.

Id. at 206. The conduct of the police officers in the instant case fell well within the scope of this decree.

In summary, the government submits that the police officers effected the arrest of appellant in a prudent, effective and entirely constitutional manner. As Mr. Justice Clark recognized in *United States v. Brown*, *supra*, the reasonableness of police action in cases of this type is an important factor in assessing any claimed Fourth Amendment violation. Here, as in *Brown*, the reasonableness of the officers' action is "attested by the manner of [their peaceful] entry." 467 F.2d at 424. Nor, contrary to appellant's intimation of a "general search," did the character of the police conduct change once they entered the apartment. Detective Campbell stopped to knock on the closed door which both Sheets and Muriel Walton had directed him to. And, this time with weapon drawn, since he knew that a gun used in the bank robbery had not been recovered (Finding No. 18), he once again announced to the person answering that he had an arrest warrant and asked for Victor

Syms. Even then, it was only after he saw suspicious movement that he pushed open the partially opened door and made the arrest.

On these facts, the government respectfully submits, the District Court's conclusion that the arrest was carried out in a lawful manner, a conclusion based on findings amply supported by the record, was eminently correct, and should be affirmed.

II.

Under The Totality Of The Circumstances, Donald Sheets Effectively Consented To The Police Officers' Entry Into The Apartment.

Assuming, solely for purposes of argument, that the entry to arrest was not properly based on probable cause, the government submits that the entry was justified on the basis of Donald Sheet's consent. It is well settled that consent provides one of the narrowly defined exceptions to the Fourth Amendment's warrant requirement. *E.g.*, *Davis v. United States*, 328 U.S. 582, 593 (1946). And, of course, the validity of consent is to be determined under the totality of the circumstances test. *Schneckloth v. Bustamonte*, 412 U.S. 218, 249 (1973).

The relevant circumstances in the instant case include the fact that Donald Sheets had been present on several prior occasions when the police had come to Muriel Walton's apartment looking for Victor Syms (Tr. 253). Donald Sheets thus was aware of the officers' purpose, even before Detective Campbell informed him of it. In addition, Judge Clarie, who had an opportunity to observe the witnesses at the hearing and judge their credibility, found that Sheets had "allowed" Detective Campbell to enter the apartment (Finding No. 12). This finding by the District Court is consistent with the conclusion that

the consent in this case "was in fact voluntarily given." *Schneckloth, supra*, 412 U.S. at 248.

Voluntariness of consent "is a question of fact to be determined from all the circumstances". *Id.* at 248-249. Under the circumstances presented by the record in this case, the failure to inform Sheets of his right to refuse consent, relied on by appellant, does not, in itself, preclude a finding of voluntary consent. *Id.* at 249. Furthermore, the situation in *United States v. Mapp*, 476 F.2d 67 (2d Cir. 1973), is distinguishable. There, faced with "extraordinary circumstances", which included the nighttime (2:00 a.m.) breaking down of a door and the arrest, without *Miranda* warnings, of the person whose premises were searched, the Court concluded that there was no voluntary consent. 476 F.2d at 78.⁸ Donald Sheets's admitting of the police officers did not take place in this type of coercive atmosphere.

Finally, appellant's assertion that Donald Sheet's status as a "guest" did not give him authority to consent to the officers' entry cannot be supported. This Court has held that:

Consent to a search by one with access to the area searched, and either common authority over it, a substantial interest in it or permission to exercise that access, express or implied, alone validates the search.

⁸ Appellant cannot claim, on this record, that Sheets's consent was the result of any show of armed force by the police officers, *cf.*, *Mapp*, 476 F.2d at 78 (search preceded by arrest by officer with drawn gun). Sheets's testimony that the officers pushed him away by poking a long-barrelled pistol in his stomach (Tr. 88) was explicitly rejected by the District Court (Finding No. 14); and Sheets testified that he never saw the shotgun (Tr. 93), which, according to Detective Campbell's testimony (Tr. 9), was the only weapon displayed prior to entering the apartment. Judge Clarie specifically resolved any conflicts in testimony in favor of Detective Campbell.

United States v. Gradowski, 502 F.2d 563, 564 (2d Cir. 1974). See, *United States v. Matlock*, 415 U.S. 164 (1974). Victor Syms can certainly lay claim to no greater interest in the apartment than Donald Sheets, the boyfriend of its principal occupant, who had been present at the apartment during several previous police visits. Under the circumstances, it is clear that Victor Syms assumed the risk that Sheets would allow the officers to enter in order to execute the arrest warrant. See, *United States v. Jenkins*, 496 F.2d 57, 72 (2d Cir. 1974), *cert. denied*, 420 U.S. 925 (1975); *United States v. Novello*, 519 F.2d 1078, 1080 (5th Cir. 1975), *cert. denied*, 423 U.S. 1060 (1976).

Since Donald Sheets effectively consented to Detective Campbell's entry, the arrest of Victor Syms inside the apartment was lawful, and his subsequent confession should not be suppressed.

CONCLUSION

The government, for the reasons submitted, respectfully urges that the judgment of conviction be affirmed.

Respectfully submitted,

RICHARD BLUMENTHAL
*United States Attorney for the
District of Connecticut*
P.O. Box 1824
270 Orange Street
New Haven, Connecticut

GEORGE J. KELLY, JR.
*Assistant United States Attorney
for the District of Connecticut*

United States Court of Appeals
FOR THE SECOND CIRCUIT

No. 77-1206

U S A,
APPELLEE

v.

SYMS,
APPELLANT

AFFIDAVIT OF SERVICE BY MAIL

Albert Sensale, being duly sworn, deposes and says, that deponent
is not a party to the action, is over 18 years of age and resides at 914 Brooklyn Avenue,
Brooklyn. N. Y.

served the within Brief
upon Richard S. Cramer, Esq., Federal Public Defender, Federal Building,
450 Main St., Hartford, Connecticut 06103

Attorney(s) for the Appellant in the action, the address designated by said attorney(s) for the purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in a post office official depository under the exclusive care and custody of the United States Post Office department within the State of New York.

Sworn to before me,

Albert Sensaf

This 20th day of July, 1977

Edward A. Quimby Jr.
EDWARD A. QUIMBY JR.
Notary Public, State of New York
No. 24-4613300
Qualified in Kings County
Commission Expires March 30, 1979